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In The

Supreme Court of the United States

October Term, 1991**STAY, INC.,***Petitioner,*

v.

RICHARD B. CHENEY, ET AL.,*Respondents,*

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit**

Thomas E. Abernathy IV*

D. Lee Roberts, Jr.

Smith, Currie & Hancock

233 Peachtree Street

2600 Harris Tower

Atlanta, Georgia 30303-1530

(404) 521-3800

**Counsel of Record*

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QUESTIONS PRESENTED

31 U.S.C. § 9306 requires that corporate sureties appoint resident agents by written power of attorney with the United States District Court in three separate judicial districts in order to furnish a bond to the United States. In this case, the United States accepted a bid bond even though the corporate surety had not complied with this statute.

The questions presented are:

- 1) Whether compliance with 31 U.S.C. § 9306 is a condition precedent to providing a bid bond to the United States?
- 2) Whether the Court of Appeals erred in adopting an agency interpretation of 31 U.S.C. § 9306 contrary to the plain meaning of the statute?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner Stay, Inc. and the respondents Richard B. Cheney, the Secretary of Defense, Karen A. Lefman, the Contracting Officer, and American Mutual Protective Bureau.

Petitioner Stay, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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RICHARD B. CHENEY, ET AL.,

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**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit**

The petitioner Stay, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 4, 1991.



OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 940 F.2d 1457, and is reprinted in the Appendix hereto, p. 1A, *infra*.

The memorandum decision of the United States District Court for the Middle District of Florida (Moore, J.) has not been reported. It is reprinted in the Appendix at p.12A, *infra*.

The decision of the General Accounting Office, upon which the Department of Defense relied, is reported at 69 Comp. Gen. 251 and 90-1 CPD ¶ 225, and is reprinted in the Appendix at p.20A, *infra*.¹

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. § 9306 provides:

§ 9306. Surety corporations acting outside area of incorporation and place of principal office

¹ The Competition in Contracting Act, 31 U.S.C. § 3556 provides that in a bid protest lawsuit, the decision of the Comptroller General "shall be considered to be part of the agency record subject to review."

(a) A surety corporation may provide a surety bond under section 9304 of this title in a judicial district outside the State, the District of Columbia, or a territory or possession of the United States under whose laws it was incorporated and in which its principal office is located only if the corporation designates a person by written power of attorney to be the resident agent of the corporation for that district. The designated person --

- (1) may appear for the surety corporation;
- (2) may receive service of process for the corporation;
- (3) must reside in the jurisdiction of the district court for the district in which a surety bond is to be provided; and
- (4) must be a domiciliary of the State, the District of Columbia, territory, or possession in which the court sits.

(b) The surety corporation shall file a certified copy of the power of attorney with the clerk of the district court for the district in which a surety bond is to be given at each place the court sits. A copy of the power of attorney may be used as evidence in a civil action under section 9307 of this title.

The Federal Acquisition Regulations, 48 C.F.R. Ch. 1 § 28.101-4, provide:

28.101-4 Noncompliance with bid guarantee requirements.

Noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the following situations when the noncompliance shall be waived, unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest:

- (a) Only one bid is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award.
- (b) The amount of the bid guarantee submitted is less than required but is equal to or greater than the difference between the bid price and the next higher acceptable bid.
- (c) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity bid upon, is sufficient or a quantity for which the bidder is otherwise eligible for award. Any award to the bidder shall not exceed the quantity covered by the bid guarantee.
- (d) The bid guarantee is received late, and late receipt is waived under 14.304.
- (e) The bid guarantee becomes inadequate as a result of the correction of a mistake under 14.406 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid).

(f) A telegraphic bid modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous bid and the bidder corrects any deficiency in the bid guarantee.

(g) When an otherwise acceptable bid bond was submitted with a signed bid, but the bid bond was not signed by the offeror.

(h) When an otherwise acceptable bid bond is erroneously dated or bears no date at all.

(i) When a bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number and the name and location of the project involved, so long as it is acceptable in all other respects.

The Armed Services Procurement Act, 10 U.S.C. § 2305(b)(3), provides:

Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a

contract shall be made by transmitting written notice of the award to the successful bidder.

The Administrative Procedure Act provides:

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . .

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be --

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

JURISDICTION BELOW

Petitioner's Complaint in District Court invoked jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The APA provides that:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C § 702.

The Eleventh Circuit has held that this statute, in combination with an alleged agency violation of another federal statute, is sufficient to confer subject matter jurisdiction upon a District Court. *Choctaw Manufacturing Co., Inc. v. United States*, 761 F.2d 609, 615 (11th Cir. 1985). Plaintiff's Complaint alleges a violation of the Armed Services Procurement Act ("ASPA"), 10 U.S.C. § 2305(b)(3). Under this statute, the Contracting Officer can only award to a bidder "whose bid conforms to the solicitation." The Petitioner Stay, Inc. ("Stay") alleged that the Department of Defense awarded a contract to a bidder whose bid did not conform to the solicitation in violation of 10 U.S.C. § 2305. Stay also alleged a violation of 31 U.S.C. § 9306 by the contracting officer in accepting a bond from a surety corporation which had not complied with the provisions of this statute.

The District Court's exercise of bid protest jurisdiction was also consistent with the Competition in Contracting Act, 31 U.S.C. §§ 3551-3556. Specifically, 31 U.S.C. § 3556 recognizes "the right of any interested party to file a [bid] protest with the contracting agency or to file

an action in a district court of the United States or the United States Claims Court. (emphasis added)." An "interested party" is defined in 31 U.S.C. § 3551 as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

Stay invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Course of Proceedings

This is a bid protest case filed by Plaintiff, Stay, Inc. ("Stay"), a disappointed bidder for a contract with the United States Department of Defense for the provision of security guard services at the Army Material Command Building in Alexandria, Virginia. Stay filed a verified complaint for declaratory and injunctive relief on February 27, 1990. Simultaneously, Stay filed a motion for temporary restraining order and preliminary injunction. On February 28, 1990, the District Court entered a Temporary Restraining Order enjoining the defendants from implementing the contract, which had been awarded to American Mutual Protective Bureau ("AMPB"). The Temporary Restraining Order took effect upon the posting by Stay of a \$100,000 cash bond. The Court also set a hearing on Stay's motion for a preliminary injunction for March 9, 1990.

At the hearing on March 9, 1990, the District Court granted the motion of AMPB to intervene as a defendant.

The Court also denied Stay's request for preliminary injunction based on a failure to demonstrate a substantial likelihood of success on the merits. On July 13, 1990, the District Court granted Summary Judgment in favor of the Defendants and AMPB. The July 13, 1990 Order also provided that any claim for damages on the bond be filed within 20 days. AMPB filed a claim for damages against the bond, which was denied by the District Court on September 10, 1990.

Stay filed a notice of appeal with the District Court on September 11, 1990. After oral argument, the Court of Appeals for the Eleventh Circuit affirmed the District Court opinion on September 4, 1991.

B. Statement of the Facts

This dispute arises out of invitation for bids MDA946-89-C-0041 (the "IFB") issued on May 18, 1989 by the Department of Defense Washington Headquarters Services' Procurement and Contract Office. The IFB was a small business set aside which required the furnishing of security guard services at the AMC Building in Alexandria, Virginia.

The IFB required all bidders to submit a bid guarantee with their bids in the amount of 20% of the bid price for the initial 12-month period of the contract. The IFB further required that the bid guarantee be submitted on SF24, the standard form to be used whenever a bid guarantee is required in connection with the furnishing of supplies or services to the United States Government. This

form, contained at pages L-11 and L-12 of the IFB, provides that:

4.(a) Corporations executing the bond as sureties must be among those appearing on the Treasury Department's list of approved sureties and must be acting within the limitations set forth therein.

The limitations in the Treasury Circular include the requirement that surety corporations appoint federal agents for service of process in accordance with 31 U.S.C. § 9306.

Bids were opened on June 20, 1989, in the Pentagon Building in Virginia, with seven firms submitting offers. The apparent low bidder was H & H Service Corporation ("H & H"); the apparent second low bidder was AMPB; and the apparent third low bidder was Plaintiff. Plaintiff filed an agency level protest protesting the award of the contract to either H & H or AMPB on the basis that neither company had provided a valid bid bond. After apparently investigating the bid bonds of both H & H and AMPB, the Contracting Officer decided to reject the bid of H & H as non-responsive. The Contracting Officer, however, found that AMPB's bid bond was acceptable.

After receiving notification that the Army intended to accept AMPB's bid bond, the Plaintiff filed a Bid Protest with the GAO. AMPB's bid bond was provided by a corporate surety, Merchants Bonding Company. Although the contract was to be performed in Virginia and the bid opening took place in Virginia, Merchants Bonding Company is not licensed to do business in Virginia. The Plaintiff's protest with the GAO alleged that it was improper for the government to accept a bid bond from a

surety not licensed to do business in the place of performance. The GAO denied Plaintiff's protest on December 22, 1989.

After the GAO denied Plaintiff's protest, Plaintiff discovered that Merchants Bonding Company had not appointed resident agents by written Power of Attorney as required by 31 U.S.C. § 9306 and the IFB. This statute requires surety companies to appoint Federal Process Agents in the following districts: "Where the principal resides; where the obligation is to be performed; and in the District of Columbia where the bond is returnable or filed." *See* Treasury Circular 570 note (d), 53 Fed. Reg. 25,052 (1988) and 31 U.S.C. § 9307(a)(2)(A)-(D). The requirement to appoint agents for service of process in the Treasury list is drawn from 31 U.S.C. § 9306. The language of this statute is mandatory and allows a corporate surety to provide a bond outside its state of incorporation "only if" it has designated the appropriate agents. Federal Regulations, 31 CFR § 224, also require the appointment of these process agents.

It is undisputed that AMPB's surety did not appoint Federal Process Agents as required by the IFB, statute and regulation. Merchants Bonding Company did not file a certified copy of a written power of attorney appointing a resident agent with the Clerk of the District Court for the Eastern District of Virginia (the district in which the contract was to be performed) prior to AMPB submitting its bid. Merchants Bonding Company also failed to file a certified copy of a written power of attorney appointing a resident agent with the Clerk of the United States District Court for the Northern District of California (the district in which the principal, AMPB, resides) prior to AMPB

submitting its bid. Agents were not appointed in these districts until after Stay filed its protest with the GAO.

The Clerk of the District Court for the District of Columbia, the third jurisdiction required by statute, indicated that Merchant's Bonding Company had appointed Michael J. Shea as agent for service. A letter to Mr. Shea, however, was returned to sender marked "F.O.E." (forwarding order expired).²

Stay believed that Merchants Bonding Company's failure to appoint resident agents was not only a violation of statute, but also a violation of Treasury Department regulations and the terms of the solicitation. Because AMPB's bid bond surety was not authorized to issue bonds to the United States, AMPB's bid was totally defective and non-responsive. On the basis of these new facts, Plaintiff filed a Request for Reconsideration with the GAO on January 19, 1990. By decision dated February 26, 1990, the General Accounting Office denied Stay's Request for Reconsideration. The GAO held that the failure of AMPB's bid bond surety to comply with 31 U.S.C. § 9306 was "a procedural omission that does not render the bid bond defective." See Appendix at p. 25A. The next day, February 27, 1990, Stay filed the District Court action seeking declaratory and injunctive relief.

² AMPB contends that it appointed another agent in the District of Columbia in 1988. AMPB presented no evidence, however, that this appointment was properly filed with the District Court as required by 31 U.S.C. § 9306. (R1-1-Ex.Q)

REASONS FOR GRANTING THE WRIT

The disposition of this case below hinged on whether Respondent American Mutual Protective Bureau ("AMPB") provided a valid bid bond. AMPB's bid bond surety did not appoint federal agents for service of process as required by 31 U.S.C. § 9306. The General Accounting Office ("GAO") found that this was a mere "procedural omission" which could be waived by the contracting officer. The Department of Defense adopted the GAO decision and allowed AMPB to begin contract performance. Even though this agency decision is contrary to the plain requirements of 31 U.S.C. § 9306, the Eleventh Circuit simply "rubber stamped" the GAO decision without any independent analysis of the requirements of the statute. In so doing, the court failed to satisfy its duty to responsibly review the agency action.³

This Court has given clear guidance on the appropriate judicial review of an agency interpretation of a statute:

When we interpret a statute construed by the administering agency, we ask first "whether Congress has directly spoken to the precise question at issue. If the interest of Congress is

³ The Administrative Procedure Act, 5 U.S.C. § 706, entitled "Scope of Review," provides that the "reviewing court shall decide all questions of law, interpret constitutional and statutory provisions . . . [and] shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ." The Eleventh Circuit completely abdicated its responsibility to interpret § 9306 under the APA. See *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 (3rd Cir. 1981) ("[b]lind acceptance of agency 'expertise' is not consistent with responsible review").

clear, that is the end of the matter; . . . [but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Mead Corporation v. Tilley, 490 U.S. 741, 722, 104 L. Ed.2d 796, 805, 109 S.Ct. 2156, —(1989) citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 81 L. Ed.2d 694, 104 S.Ct. 2778 (1984). When the terms of a statute are unambiguous, "judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. —, 112 L. Ed.2d 608, 616, 111 S.Ct. — (1991) (citations omitted). The reasonableness of the agency interpretation is only relevant if the statute is ambiguous.⁴

The Eleventh Circuit completely disregarded this analytical framework in affirming the agency interpretation of 31 U.S.C. § 9306. The court made no finding that the provisions of this statute were ambiguous or unclear. The court based its decision solely on the reasonableness of the agency decision.

It was improper to defer to the agency decision because the statute is not ambiguous in the least. Section 9306(a) provides that a surety corporation may provide a bond outside the state of its incorporation "only if" the corporation designates the appropriate registered agents for service of process. Similarly, 31 U.S.C. § 9304(a)

⁴ In the context of the APA, the District Court for the District of Columbia has similarly stated that the "rationality of an agency's action . . . is relevant only if it did not violate applicable regulations or statutes." *Abel Converting, Inc. v. United States*, 679 F.Supp. 1133, 1139 n.8 (D.D.C. 1988).

provides that: "When a law of the United States Government requires or permits a person to give a surety bond through a surety, the person satisfies the law if the surety bond is provided for the person by a corporation . . . (3) complying with sections 9305 and 9306 of this title."

Furthermore, Section 9306(b) provides that the surety corporation "shall file" a certified copy of the power of attorney with the District Court for the district in which a surety bond "is to be given." Once again, Congress has "unambiguously spoken. The words "shall file" are mandatory and the words "is to be given" clearly mandate that the power of attorney be filed prior to the giving of the bond.⁵ It would have been difficult for Congress to have been any clearer. Congress intended that corporate sureties could provide bid bonds to the United States "only if" they complied with this statute.⁶ A surety corporation

⁵ The mandatory nature of this statute is also reinforced by referring to its predecessor statute, 6 U.S.C. §§ 6-13 (1974). This statute provided that "no such company shall do business" until it appoints the required Federal process Agents. 6 U.S.C. §§ 6-13 were repealed, reworded for clarity, and recodified at 31 U.S.C. §§ 9301-9307. At the time of this recodification, the Congressional history indicates that no substantive change to the statute was intended by the rewording and recodification. See H. Rep. No. 97-651, 128 Cong. Rec. 5452, 1982 U.S.C.C.A.N. Vol. 3, p. 1895 (1982). In rewording the statute to its present form, the House Report notes that "shall" is used in the "mandatory and imperative sense." *Id.* at p. 1896.

⁶ The GAO decision is also in conflict with the Treasury Department's interpretation of 31 U.S.C. § 9306. In promulgating regulations pursuant to this statute, the Treasury Department stated: "Companies should especially note that the law prohibits the doing of business under the provisions of this act beyond the State under whose laws it was incorporated and in which its principal office is located until an agent is appointed to accept Federal process on behalf of the company . . ." 31 C.F.R. § 224.2(a) (emphasis added). Similarly, Treasury Circular 570, note (d), 53 Fed. Reg. 25,052 (1988), requires that agents be appointed as required by 31 U.S.C. § 9306.

has no authority to provide a bond to the United States if it has not complied with 31 U.S.C. § 9306.

In adopting the agency position that a surety does not have to comply with 31 U.S.C. § 9306, the Eleventh Circuit did not try to reason that the requirements of the statute were unclear.⁷ Rather, the Eleventh Circuit found that this statute did not have to be enforced as written because it was not important. For example, the court found that "the DOD and the GAO could reasonably conclude that the congressional interest in having agents appointed for service of process in particular states at the time bids are submitted" is not very strong. Appendix at pp. 10A-11A. Similarly, the court cited a supposed "lack of a strong public interest underlying the requirement." *Id.* at 11A.

These are not valid reasons for failing to enforce the clear requirements of a statute. Congress did not intend for a corporate surety to be able to provide a bond to the United States unless it had appointed federal process agents in the appropriate districts prior to providing the bond. The Eleventh Circuit has substituted its judgment for that of Congress, and evidently believes that it is empowered to waive compliance with this or any statute which it does not feel is important enough to be enforced.

An affirmation of the court's decision would effectively frustrate Congress' intent in passing this statute.

⁷ The GAO and the Eleventh Circuit held that the lack of compliance with 31 U.S.C. § 9306 could be cured after bid opening. Not only is this contrary to the plain terms of the statute, it is totally irrational. It is a fundamental rule of government contracting that a non-responsive bid may not be made responsive after bid opening. This would give the bidder the option to make its bid responsive after other bids are exposed and destroy the integrity of the bidding process.

If compliance with this statute can be waived or cured, corporate sureties will not go to the trouble and expense to comply with the appointment of federal process agents prior to submitting a bid bond as intended by Congress. It is well settled that an agency's construction of a statute should not be adopted by the Court where the administrative construction would "frustrate the policy that Congress sought to implement." *Curry v. Block*, 738 F.2d 1556, 1560, n.6 (11th Cir. 1984), *citing Federal Election Commission v. Democratic Senatorial Campaign Commission*, 454 U.S. 27, 37, 102 S.Ct. 38, 44 70 L. Ed.2d 23 (1981).

More importantly, this Court cannot sanction the Court of Appeals cavalier approach in disregarding the clear requirements of this statute. The courts cannot selectively enforce statutes based on their own view or an agency's view of their importance. In order to preserve fairness, and the perception of fairness, there must be certainty in the competitive bidding process and uniform enforcement of procurement statutes and regulations. If the provisions of a statute are clear, they must be enforced. Bidders cannot be left guessing which procurement statutes will be deemed important enough to enforce and which are unimportant enough to disregard.

CONCLUSION

For all of the above reasons, Stay, Inc. respectfully requests that this petition for certiorari be granted.

Respectfully submitted,

Thomas E. Abernathy IV*
D. Lee Roberts, Jr.
SMITH, CURRIE & HANCOCK
233 Peachtree Street
2600 Harris Tower
Atlanta, Georgia 30303-1530
(404) 521-3800
Attorneys for Petitioner
**Counsel of Record*

December 3, 1991

